United States Court of Appeals

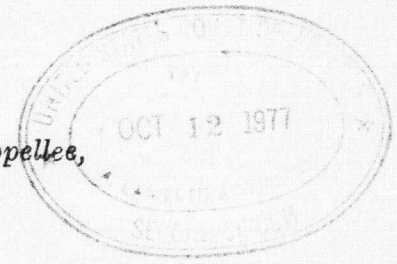
for the Second Circuit

APPELLEE'S PETITION FOR REHEARING EN BANC

76-7631

United States Court of Appeals

FOR THE SECOND CIRCUIT



ORECK CORPORATION,

Plaintiff-Appellee,

—v.—

WHIRLPOOL CORPORATION and SEARS, ROEBUCK AND CO.,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC BY PLAINTIFF-APPELLEE

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October 7, 1977

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Docket No. 76-7631

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PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING IN
BANC BY PLAINTIFF-APPELLE

TO THE HONORABLE JUDGES OF THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT:

The plaintiff-appellee Oreck Corporation respectfully petitions this Court pursuant to Fed. R. App. P. 40(a) for a rehearing of its Decision and Opinion of September 21, 1977. Over the vigorous 15-page dissent of Judge Mansfield, the majority (Judges Anderson and Brieant) reversed a judgment entered July 13, 1976, in the United States District Court, Southern District of New York (Owen, J.) based upon a jury verdict of $2,250,000 (after trebling) in favor of Oreck against defendants-appellants Whirlpool Corporation and Sears, Roebuck and Co. After a 16-day trial generating 1,883 transcript pages and 116 exhibits, the jury found a conspiracy under Section 1 of the Sherman Act (15 U.S.C. §1) between Sears and Whirlpool to eliminate

Oreck as a competitor of Sears in the distribution of Whirlpool vacuum cleaners.

Oreck also respectfully suggests that a rehearing in banc is particularly appropriate here. The closing passage of Judge Mansfield's dissent indicates how fully the demonstrations required by Rule 35(a) -- the necessity for maintaining uniformity of this Court's decision or the involvement of questions of exceptional importance -- have been made (slip op. at 6074-75):

> ...The majority has in my view seriously erred in its concept of the antitrust principles that govern this case. The decision departs from basic principles established in numerous decisions of the Supreme Court. It will have mischievous results, since it will be seized upon by those who would otherwise be bound by established precedent to demand similar treatment. It weakens the private enforcement of the antitrust laws, upon which the Executive Branch heavily depends. I therefore dissent.

STATEMENT OF THE CASE

The commercial posture of this case is that of two independent competitive units -- one large and one small -- which competed directly and intensely in the resale of vacuum cleaners made by a single manufacturer. Since 1957 Sears has marketed Whirlpool-made vacuum cleaners under the Kenmore label. For many years Sears has purchased some two-thirds of Whirlpool's total output of appliances, has had a representative on Whirlpool's Board and has been its largest stockholder. In 1963 Oreck was formed at Whirlpool's behest to provide, under Oreck's name, a distribution system in addition to Sears' and from 1963 to 1971

purchased Whirlpool vacuum cleaners outright and achieved full dominion over them. These facts were uncontroverted.

Oreck's distribution system was established against a background of warnings from Sears to Whirlpool that it would not tolerate serious price competition in the sale of vacuum cleaners, but Oreck's sales nonetheless increased dramatically, inter alia, by virtue of a shift from dealer sales to a lower-priced mail order business. Over the years Oreck's competition with Sears became too intense for Sears to tolerate, and by 1971 Sears eliminated Oreck as a competitor with the conspiratorial cooperation of Whirlpool -- evidenced, among other ways by restraints on Oreck's competition with Sears in terms of price, mail order business, private label sales and sales in Canada. These and related facts of record are more fully described in Oreck's brief on appeal (pp. 4-18) and in the dissenting opinion (slip op. at 6060-66 and 6070, n.2).

REASONS FOR GRANTING THE PETITION AND SUGGESTION

POINT I

THE MAJORITY OVERLOOKED OR MISAPPREHENED THE JURY'S FINDING OF CONSPIRACY AND HENCE ERRONEOUSLY RELIED UPON CASE AUTHORITY WHICH PREMISES LAWFUL UNILATERAL ACTS RATHER THAN DEFENDANTS' UNLAWFUL CONCERTED ACTS AS FOUND BY THE JURY

The majority's rewriting of the facts as if they were non-conspiratorial directly contravenes bedrock doctrine of judicial restraint in reviewing jury verdicts. For example, as

the dissent notes (slip op. at 6060), the appellate court must give the prevailing party in a jury trial "the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn". Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 696 (1962). The scope of appellate review of issues of fact in antitrust cases is exceedingly narrow, placing on one seeking to overturn findings of fact "an almost insurmountable burden". International Boxing Boxing Club v. United States, 358 U.S. 242, 252 (1959); Besser Manufacturing Co. v. United States, 343 U.S. 444, 446 (1952). Since the jury's finding that defendants acted in concert is a finding of ultimate fact it, in particular, is protected from appellate tampering by the "clearly erroneous rule" of Fed. R. Civ.P. 52(a). In Zenith Radio Corp. v. Hazeltine Research, Inc. 395 U. S. 100, 123 (1969), the Supreme Court warned that under the "clearly erroneous" standard appellate courts must be careful not to decide such factual issues de novo in antitrust cases. See also, Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962); United States v. Aluminum Company of America, 148 F. 2d 416, 433 (2d Cir. 1946): United States v. General Dynamics Corp., 415 U.S. 486, 508 (1974).

The majority either overlooked or, regrettably, ignored the facts as found by the jury, particularly the jury's critical findings of agreement or conspiracy between Sears andWhirlpool to exclude Oreck from selling Whirlpool vacuum cleaners. The

majority's view of the facts as non-conspiratorial obliterated the critical distinction drawn in the cases between conspiratorial elimination of competition and unilateral refusals to deal. (See Oreck's brief on appeal, pp. 33-35.) In supplier-distributor cases where one distributor is substituted for another the termination of the distributor generally does not amount to conspiracy, even though the supplier prior to substitution may have consulted with the new distributor, for there is as a matter of evidence no conspiracy, the supplier having merely exercised his own business judgment in cancelling a distributor. There is no policy of law favoring distribution of a product through a single distributor. But when two persons agree to accomplish the illegal purpose of eliminating an existing distributor from price and other competition with the favored distributor, we are in a different world of different cases. See, United States v. General Motors Corp., 384 U.S. 127, 146-47 (1966) and other cases cited in Oreck's brief on appeal (pp. 29-35) and in the dissent here (slip op. at 6055-56, 6061, 6067-70).

As the dissent recognized (slip op. at 6060), the evidence before the jury established "a classic per se restraint of competition of the type condemned by the Supreme Court" in General Motors. The evidence that both Whirlpool and Oreck (beginning in 1963) were not to create price competition for Sears (slip op. at 6062-64) -- combined with defendants' efforts to exclude Oreck from the mail order business (slip op. at 6065) -- is close to the facts of General Motors (384 U.S. at 146-47).

that case, together with an unbroken line of other Supreme Court precedents, show that the Court is particularly zealous in enforcing the ban against exclusion, partial or otherwise, when the boycott has an effect on price. See, e.g., Simpson v. Union Oil Company of California, 377 U.S. 13 (1964); United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

POINT II

THE MAJORITY HAS MISAPPLIED TO THE SHERMAN ACT SECTION 1 IRRELEVANT, BURDENSOME MARKET TESTS IMPORTED FROM OTHER ANTITRUST STATUTES

Perhaps the majority's most startling error is its supposition that violation of Section 1 of the Sherman Act, on the facts before the jury, required proof of an unreasonable economic effect in the vacuum cleaner market in the United States and/or Canada (slip op. at 6054), thus mistakenly importing into Section 1 a test found in Section 2 monopoly cases and, in somewhat different form, in Clayton Section 7 merger cases. Section 1 refers to "restraint of trade or commerce among the several States, or with foreign nations." In an unbroken line of cases beginning with W. W. Montague & Co. v. Lowry, 93 U.S. 38, 46 (1904), the Supreme Court has held that such restraints are not circumscribed by size. In United States v. Yellow Cab Co., 332 U.S. 218, 225-26 (1947) the Court said:

> Section 1 of the Act outlaws unreasonable restraints on interstate commerce, regardless of the amount of the commerce affected.... Likewise irrelevant is the importance of the interstate commerce affected in relation to the entire amount of that type of commerce in the United States....

The majority's views on product market also conflict with uniform Supreme Court holdings that exclusion from only a portion of the market is sufficient to establish an illegal per se boycott. In a strikingly apposite case, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), a small retailer in electrical appliances was boycotted from access to some appliances at the instance of a competitive retailer (359 U.S. at 213). See also, Silver v. New York Stock Exchange, 373 U.S. 341, 348 n.5 (1963) where the service of private stock wire connections was barred to plaintiff. Similar results were reached in Associated Press v. United States, 326 U.S. 1, 18 (1945), and Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 44 (1930).

In the Klor's case its competitor, Broadway-Hale, complained to the suppliers of some of the appliances that Klor's was cutting prices, and these suppliers (including Whirlpool, one of the defendants here) cut off Klor's from further supply or limited it to high priced goods. The majority's thinking about market here (slip op. at 6054) makes it noteworthy that Klor's was not put out of business and that it had other sources of supply. The Supreme Court said that injury to the public is irrelevant and Klor's itself must be protected, stating a boycott "is not to be tolerated merely because the victim is just one small merchant whose business is so small that its distruction makes little different to the economy" (359 U.S. at

213). The authority of Klor's cannot be escaped by calling the instant facts "an exclusive distributorship controversy" (slip op. at 6058).

The majority commits yet another error of grievous import in antitrust enforcement when it states that a Klor's-type "horizontal conspiracy" is not involved here because only one retailer (Sears) was a conspirator (slip op. at 6058). There is nothing in the words "horizontal" or "vertical" which controls whether a boycott exists. The jury found that Whirlpool (the supplier, therefore, vertical) agreed with Sears, Oreck's competition (therefore, horizontal). Apparently the majority, however, feels that more than two actors -- and more than two competitors to boot -- are required for a conspiracy to boycott, and that this distinguishes Klor's (slip op. at 6058). Since only a single horizontal competitor pursued Klor's, the "distinction" drawn by the majority shows how apt and moderate was Judge Mansfield's use of "mischievous" (slip op. at 6075). Section 1 requires multiple actors -- two or more -- but does not require three or more, as the majority here holds.

On a horizontal level other dealers complained about the price cutting of a discount house selling Chevrolets, but it was General Motors (vertical) which made the boycotting effective by preventing the sale of Chevrolets to the discount house in United States v. General Motors Corp., 384 U.S. 127 (1966). In Fashion Originators' Guild of America, Inc. v.

Federal Trade Commission, 312 U.S. 457 (1941), the boycotters were active on every level of the textile industry, boycotting a dress manufacturer which "pirated" a dress design. The Court stated in Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236 (1948):

> [The Sherman Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers.... [It] is comprehensive in its terms and coverage, protecting all who are made victims....

When Oreck was pushed out of the sales of Whirlpool vacuum cleaners after eight years leading to highly successful distribution near the end of its contract, it suffered what Judge Mansfield called "a classic per se restraint of competition" (slip op. at 6060). Nowhere, except in this majority opinion, is it written that the trade restrained under Section 1 must correspond with some "market" such as might be necessary as a proper base for a monopoly charge. It is too late in the day for importation into Section 1 of a market restraint requirement which will vastly curta the enforcement of that statute.

POINT III

THE MAJORITY'S HOLDINGS ABOUT PRODUCT MARKET AND "PUBLIC HARM" ARE DIRECTLY CONTRARY TO IMPORTANT SUPREME COURT DOCTRINES WHICH UNIFORMLY HAVE BEEN FOLLOWED IN THIS CIRCUIT

The majority opinion must be erased in order that the important doctrines set forth in General Motors and Klor's

will continue to be followed uniformly in this Circuit.

Rehearing in banc is necessary in order to reestablish the General Motors doctrine in this Circuit unincrusted with the limitations imposed by the majority here that the boycott must operate in a market not limited to Chevrolets but including all makes of automobiles. General Motors was followed in Bowen v. New York News, Inc., 522 F.2d 1242 (2d Cir. 1975), cert. denied, 96 S.Ct. 1667 (1976), in a well-reasoned, unanimous opinion by Judge Walter Mansfield which creates a sharp conflict with the majority opinion here. Bowen dealt with the delivery of a single newspaper (the Daily News) under circumstances where franchised route dealers wished to prevent independents from competing with them (522 F.2d at 1256). In affirming that defendants violated Section 1, this Court held (at 1256-57):

> The News' conduct, undertaken pursuant to an agreement with the franchise dealers and for the purpose of restricting the access of terminated independents to the News, amounts to an unlawful conspiracy in violation to § 1 of the Sherman Act and is remarkably similar to that condemned by the Supreme Court in United States v. General Motors Corp., 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966). ...Here we have proof that the News took action against the independent route dealers at the request of the franchise dealers, and conspired with them to cut off the independents' source of supply, thus excluding the latter as competitors in areas where the franchise system operated. Cf. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959).

Moreover, in Bowen this Court found the conspiracy to violate Section 1 of the Sherman Act illegal per se, without

analysis of the effect on any "market" for home delivery of the Daily News handled separately from all other newspapers and magazines. In contrast, the Sherman Act Section 2 claim of conspiracy to monopolize trade in the Daily News -- requiring proof of an appropriate market -- properly was dismissed by this Court.

Rehearing in banc also is required in order to secure and maintain uniformity of this Circuit's decisions in respect of the important and well-established rule stated in Klor's that a Sherman Act Section 1 plaintiff need not show "public injury" in order to recover.

Within two years after Klor's was decided the Supreme Court reaffirmed that a private plaintiff suing under Section 1 need not demonstrate public injury. In Radiant Burners, Inc. v. Peoples Gas Lgt. & Coke Co., 364 U.S. 656 (1961), the Supreme Court overruled the holding of the Seventh Circuit that the per se rule of boycott applied "only under circumstances where there is such general injury to the competitive processes that the public at large suffers economic harm" (364 U.S. at 659). Since these two rulings, only a handful of antitrust defendants have had the temerity to raise the "public injury" defense, but the defense uniformly has been stricken in this circuit in the very few instances it has been raised. See Syracuse Broadcasting Corp. v. Newhouse, 295 F.2d 269, 277 (2d Cir. 1961) and the cases below.

The majority holding that a cause of action under

Sherman Act Section 1 requires a showing of "public injury" ("public harm", slip op. at 6060) is just wrong. "Cases in this circuit have held that an allegation of public injury is not essential in any claim for relief under Section 1 of the Sherman Act". Fleischmann Distilling Corp. v. Distillers Co., Ltd., 395 F. Supp. 221, 228 (S.D.N.Y. 1975). In K. S. Corp. v. Chemstrand Corp., 198 F. Supp. 310, 314 (S.D.N.Y. 1961), Judge Metzner said:

> [U]nder any alleged violation of Section 1 of the Sherman Act, the plaintiff no longer need show that the public has been deprived of goods or that it had to pay a higher price for them or accept an inferior substitute. The result is that the small business man is protected to the same extent as a larger one.

POINT IV

THE JURY INSTRUCTIONS WERE ERROR ONLY IF THE MAJORITY'S VIEW OF LIABILITY WAS CORRECT, AND IN ANY EVENT THE "PLAIN ERROR" CONCEPT WAS MISAPPLIED

The majority in this civil case reached the startling conclusion that "the above-quoted portions of the jury instructions constitute plain error which make necessary a reversal of this judgment" (slip op. at 6057). We attach as an appendix a copy of the relevant pages of the judge's charge underscored and marked by us in the margin "First", "Second" and "Third" to make the quoted charges plain.

We submit that there was no error in the quoted charges and that any suggestion of error is derivative from the

majority's mistaken concept of the applicable substantive law of liability. Subsidiarily, whether or not any error existed, the facts do not allow application of the "plain error" doctrine.

The instruction in the first quoted paragraph was requested verbatim by defendants (No. 10) thus "inviting error"* but even if pulled from context, is unobjectionable.

The second quoted paragraph, not objected to by defendants, was presented by the trial judge to counsel for comment both before (Tr. 1060) and after (A. 952-53) the jury charge (A. 953). The charge states in effect that if the jury finds the violations alleged they constitute unreasonable restraints of trade. The trial judge is talking about an agreement to boycott, a per se violation presumed to be unreasonable. The instruction means no more than if the jury finds the agreement to exclude Oreck it should not consider whether or not it is unreasonable. Only if we are to accept the majority's premise that the evidence does not amount to an illegal boycott can this instruction be called error.

The third condemned instruction to the effect if the jury finds there was an agreement to exclude Oreck from a market in vacuum cleaners or Whirlpool vacuum cleaners anywhere it should "go on to consider damages if any flowing from it" is unobjectionable for the same reason. If there is such an agreement the next pertinent inquiry is not justification nor effect, but damages precisely as the judge charged. Although the

*Irreversible since "invited". Gardner v. Darling Stores Corporation, 138 F. Supp. 160, 161-62 (S.D.N.Y. 1956), aff'd, 242 F.2d 3, 7 (2d Cir. 1957).

exact formulation of the third instruction was prepared by the trial judge, it is substantially the same as one requested by defendants (No. 20) so this also was "invited error".*

It appears that the majority also believes that this language is "plain error" because of the definition of market, (slip op. 6058) since the trial judge referred to the exclusion of Oreck from either the general market in vacuum cleaners or a market for Whirlpool vacuum cleaners. Certainly the latter was where the restraint found by the jury fell and as our analysis shows it is not necessary to prove the former in this Section 1 case. There was no error in any of the quoted charges if Oreck is correct as to the applicable substantive law of antitrust.

Fed. R. Civ. P. 51 expressly precludes review of a jury instruction unless counsel opposing it "objects thereto before the jury retires to consider its verdict." Its purpose "is to expedite the administration of justice by insuring that the trial judge is informed of possible errors so that he may have an opportunity to reconsider his charge, and, if necessary, to correct it." Troupe v. Chicago D. & G. Bay Transit Co., 243 F.2d 253, 259-60 (2d Cir. 1956); Pierce Engineering Co. v. City of Burlington, Vt., 221 F.2d 607, 609 (2d Cir. 1955). "Actual reversals on the basis of plain error are rare ...." Wright & Miller, Federal Practice and Procedure: Civil, §2558 at 672.

This Circuit has repeatedly held, however, that "[i]f

*The majority apparently was unaware that much of this charge was requested by defendants. (Defendants' Inst. No. 20)

there is to be a plain error exception to Rule 51 at all, it should be confined to the exceptional case where the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings." Cohen v. Franchard Corporation, 478 F.2d 115, 125 (2d Cir.), cert. denied, 414 U.S. 857 (1973). There has been no demonstration that any of the tests of Cohen is met in this civil case. The instructions here were over-ruled sua sponte by the majority without briefing from the parties.

POINT V

THIS CASE INVOLVES QUESTIONS OF EXCEPTIONAL IMPORTANCE TO THE PRIVATE ENFORCEMENT OF THE ANTITRUST LAWS

The Court's attention is respectfully addressed to the statement of Judge Mansfield at pages 6074 and 6075 of the slip opinion, which indicates the compelling need for an in banc reconsideration of this appeal. We cannot believe that the Second Circuit, long noted for its distinguished and progressive interpretations of the antitrust statutes, will let this decision stand.

CONCLUSION

For the reasons given petitioner respectfully suggests that the Court should rehear the appeal in banc or by its panel and affirm in all respect the judgment below.

Dated: New York, New York
October 7, 1977

Respectfully submitted,

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APPENDIX

Thus, in order to find Whirlpool and Sears guilty of a violation of Section 1, you must find that at some point they acted together to bring about the result charged by the plaintiff.

Once agreement has been reached, however, each conspirator is fully liable for the consequences of any act done by the other co-conspirator in furtherance of the conspiracy.

This is true even though the conspirator being charged with liability has done nothing to effectuate the objects of the conspiracy other than the act of reaching agreement with his co-conspirator to carry out the unlawful act.

Thus, if you find that Sears suggested or advised Whirlpool to terminate Oreck's franchise, or to prevent Oreck from selling vacuum cleaners in any market, then you may also find that Sears is liable for any consequences of Whirlpool's having taken such action.

[As to the meaning of the term "restraint of trade," you are instructed that this general term applies only to unreasonable restraints and not to all possible restraints of trade. Not all restraints of trade are reasonable. All business affects trade in some way.]

FIRST

[The violations alleged by the plaintiff are, if

you credit them, unreasonable restraints of trade. If you do not credit them, Whirlpool's conduct was not an unreasonable restraint of trade. J

SEE CONDO

I charge you that a manufacturer has the right to deal with whom he pleases and to select his customers at will as long as there is no resultant effect which is violative of the antitrust laws. The manufacturer may discontinue an exclusive distributorship or may refuse to renew an exclusive distributorship for business reasons which are sufficient to the manufacturer alone and any adverse effect such a decision may have upon the business of the distributor is immaterial in the absence of any arrangement or conspiracy restraining trade or competition.

Whether an unlawful combination or conspiracy is proved may be judged by what the parties actually did rather than the words they used -- in other words, their course of dealing.

3 Keep in mind that if a conspiracy exists it may not have been in a formal agreement that by words spoken or written stated what the object was or the conspiracy was to be or the details of it or the means by which the objects or the purpose were to be accomplished.

Thus, it may well be that the only method whereby one can show an unlawful conspiracy existing is through

circumstantial evidence which, if you credit it, as I have said, is of no less weight than the rest of it.

Should you find that from a preponderance of the evidence in this case that a conspiracy existed and that the defendants were members, then the statements made and the acts performed by any person in furtherance of that conspiracy may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the statements and acts may have occurred in the absence and without the knowledge of the other defendant, provided such statements and acts were knowingly made and done during the continuance of such conspiracy and the furtherance of some object or purpose of it.

You are instructed, therefore, that in order to recover under Count 1 Oreck has the burden of proving each of the following propositions:

That Whirlpool and Sears combined or conspired to exclude Oreck from the market for Whirlpool vacuum cleaners, or from the vacuum cleaner market generally in the United States and its possessions and to lessen the competition in either of these markets.

Two. That as a result of said combination or conspiracy Oreck was partially or wholly excluded from

the vacuum cleaner market as I have described above.

Three. That as a proximate result of said exclusion Oreck has in fact suffered damage.

Unless you find that each of these propositions has been proved by a fair preponderance of the credible evidence, your verdict must be for the defendants with regard to Count 1.

It is your duty to give separate personal considerations to the case of each individual defendant here. When you do so you should analyze what the evidence shows with respect to each such defendant.

To find by a preponderance of the evidence that a combination or conspiracy existed, you must determine as to each defendant separately and individually whether or not it participated in forming the conspiracy.

The membership of a particular defendant in the conspiracy must be determined from the evidence concerning its own actions.

Each defendant has the right to that kind of consideration on your part as if it were being sued separately.

In light of this, one question I suggest you consider, although I want to firmly state that all questions for you to consider and how you decide them are for you

and you alone to decide in accordance with the evidence, but one question I suggest is whether or not you conclude that some person or persons at Whirlpool had an agreement or understanding with some person or persons at Sears to exclude Oreck from a market in vacuum cleaners or Whirlpool vacuum cleaners anywhere.

If you find there was such an agreement, then you shall go on to consider damages, if any, flowing from it. If you do not find such an agreement between Whirlpool and Sears people, then your verdict must be for defendants, for it is not unlawful for a manufacturer merely to try to keep all of its customers happy, large or small.

Plaintiff contents that in determining whether or not a conspiracy existed, you may consider, among other evidence that was urged upon you yesterday, what it contends and has called Whirlpool's "economically irrational behavior" in refusing to sell some approximately $1 million worth of vacuum cleaners to Oreck on or after the termination of the contract in the end of 1971.

Although David Oreck personally claimed to have such a line of credit, as the plaintiffs urge, the plaintiffs point out that thereafter these machines were sold at a loss to others in the market.

T4 Now, ladies and gentlemen, my instructions to you are to be taken as a whole, as an entirety. Do not read into them anything that I have not expressly told you. Consider all the evidence. The fact that I may have referred to some and not other pieces does not mean that it is not all important. You should consider it all.

A word about deliberating: each juror is entitled to his or her own opinion. Each jury should, however, exchange views with fellow jurors. That is what jury deliberation is all about. Discuss and consider the evidence. Listen to the arguments of fellow jurors, present your individual views, and discuss the case with one another. Consult fairly and openly with one another in the juryroom to reach a verdict based solely and wholly on the evidence, if you can do so without doing violence to your individual judgment.

Each one of you must decide the case for himself or herself after consideration with fellow jurors, but you should not hestitate to change an opinion you may hold which after discussion with your fellow jurors appears erroneous in the light of the discussion viewed against the evidence and the law.

However, if after carefully weighing and listening to all the arguments of your fellow jurors and weighing

STATUTORY ADDENDUM

15 U. S. C. § 1:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

CERTIFICATION OF SERVICE

BERNARD ZUCKER hereby certifies that he is a member in good standing of the bar of this Court and that on October 7, 1977 he served copies of the foregoing Petition for Rehearing and Suggestion for Rehearing In Banc by Plaintiff-Appellee upon counsel for Defendants-Appellants, namely: Joseph A. Skinner, Esq., General Counsel Legal Dept., Sears, Roebuck and Co., 1633 Broadway, New York, New York 10019 and Michael R. Turoff, Esq., Arnstein, Gluck, Weitzenfeld & Minow, 75th Floor, Sears Tower, Chicago, Illinois 60606 by first-class mail properly addressed with the proper postage affixed.

Dated: New York, New York
October 7, 1977

BERNARD ZUCKER